

22 June 1999

Parliament of Australia
Joint Select Committee on
the Republic Referendum

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Attention: Claressa Surtees

Constitution Alteration (Establishment of Republic) Bill 1999

I wish to make the following submissions to the Select Committee with a view to improving the Bill for the establishment of an Australian republic, although I am personally in favour of retaining the existing Constitutional arrangements.

Proposed s 59

The third paragraph of this proposed section is as follows:

“The President shall act on the advice of the Federal Executive Council, the Prime Minister or another Minister of State; but the President may exercise a power that was a reserve power of the Governor-General in accordance with the constitutional conventions that related to the exercise of that power by the Governor-General”.

I have serious concerns about this paragraph.

The first part would impose an obligation on the President (“shall act on”) which the Governor-General does not have, and which, in my view, would be legally binding, and therefore justiciable in the High Court. See generally *The Queen v Toohey ex parte Northern Land Council* (1981) 151 CLR 170. This would be merely theoretical in normal circumstances because a President, like the Governor-General, would act on constitutional advice. The prerogative of the Governor-General, like that

of the Sovereign or her other representatives, to be consulted, to receive constitutional advice, and to warn, would probably continue under a republic despite the mandatory “shall”.

The real difficulty lies in the proviso introduced by “but”. This continues the existing reserve powers of the Governor-General, but only when exercised “in accordance with the constitutional conventions that related to the exercise of that power by the Governor-General”.

Since this is a proviso to a legally enforceable duty, the drawing of the boundary between the duty and the discretion will become justiciable. This creates a further difficulty. The discretion of the President is to exercise a reserve power “in accordance with the constitutional conventions”. This means that a reserve power will only be validly exercised if it is exercised in accordance with those conventions. This would make the content of the constitutional conventions a justiciable question for the High Court for the first time.

Accordingly on a hypothetical re-run under a republic of the events of November 1975 the validity of the dismissal of the Prime Minister will become a justiciable question which could be litigated in the High Court. Until the decision of the High Court was known the country would be paralysed with two Presidents and two Prime Ministers. Instead of a quick dismissal, followed by an early general election as in 1975, we would have a six to eight week power vacuum, perhaps without supply, and a highly charged political case in the High Court.

Under current arrangements a convention may be emerging that a Governor-General should warn a Prime Minister before exercising the reserve powers. This could work because the Governor-General is not subject to immediate dismissal by the Prime Minister. However such a convention could not survive as such under a Constitution which made the President subject to instant dismissal by the Prime Minister but it may be legally binding on a President by virtue of the third paragraph of cl 59. As a result a dismissal without warning may be declared invalid by the High Court and a dismissal after a warning may never occur because the warning will trigger an immediate counter-dismissal or will never be attempted because of the fear of such a dismissal.

I became so concerned about these aspects of the exposure draft that I consulted Sir Gerard Brennan, the previous Chief Justice of the High Court, who agrees with my views on this question. I attach a copy of his letter to me which incorporates a suggested redraft of the third paragraph.

A republican model with clause 59 in its present form would rightly be seen as damaging to our future political stability. It would also be seen

as further reducing the capacity of a President to act as the guardian and protector of our Constitution.

The Convention did not recommend a provision like the third paragraph of clause 59 in its present form. The referendum campaign should not be unnecessarily complicated by additions to the Convention recommendations which make the model worse than it has to be. Although, as I have said, I am personally opposed to a republic, I hope that the model submitted to the Australian people will be the best that can be devised consistent with the recommendations of the Convention.

Proposed sections 62 & 63

Under the first paragraph of proposed section 62 the Prime Minister may summarily dismiss the President. Under the first paragraph of proposed s 63 the longest-serving State Governor then becomes the acting President, but the effect of the first and third paragraphs of s 63 is that he and every other State Governor may also be summarily dismissed by the Prime Minister. When the last State Governor has been dismissed Australia will have no President and no Acting President, and thus no one who can sign Bills into law, summon, adjourn, or dissolve Parliament, issue writs for a general election, preside at the Executive Council, or exercise any of the other powers of a President under the Constitution.

The political situation which provoked seven such dismissals would almost certainly guarantee that a two thirds majority for a new President could not be secured, but even if it could be a lengthy period would elapse before a new President could be appointed during which Australia had no Head of State.

Such a scenario would do enormous damage to the reputation of this country for political and economic stability. Under the present draft there would be no clear constitutional solution. The Convention did not recommend such provisions, and they make the model much worse than it needs to be.

I suggest therefore that the Prime Minister should have no power to dismiss an acting President, and that proposed s 63 be amended accordingly.

Yours faithfully

Justice K R Handley

Enc

(Retyped from original letter at the request of Handley JA.)

The Hon Sir Gerard Brennan AC KBE

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17 May 1999

The Hon Mr Justice K R Handley AO

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Dear Ken,

I finally found the relevant Exposure draft. In my view, par 3 of the draft s.59 ought to read somewhat along the following lines:

“The powers of the President, other than the reserve powers, shall be exercised on the advice of the Federal Executive Council, the Prime Minister or, in a matter relating to a Department of State, the Minister administering that Department”.

I shall explain my reasons when we meet.

Yours sincerely

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